

TO: Wetlands Task Force
FROM: Sean O. Coffey, Chair – Statutory Working Group
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DIRECT DIAL: [401] 831.8173
DATE: May 2, 2000
RE: Final Report of the Statutory Working Group

This Final Report will summarize the discussions and deliberations of the members of the Statutory Working Group during its meetings of February 24, March 15, April 13 and 27, 2000. Each meeting commenced at 8:30 a.m. in the Director's Conference Room at DEM and lasted for approximately two hours. Based on the charge from the Task Force, the Statutory Working Group focused its discussions on a number of specific issues identified by the full Task Force. The Working Group analyzed each of these issues for (1) its impact on the wetlands regulatory program, the resource being protected and the regulated community; (2) the importance of the statutory change being proposed; and (3) whether an alternative regulatory change could be fashioned to address the issue, concern or problem. In addition, the Task Force reviewed a revised version of the wetlands reform legislation originally introduced on behalf of the Governor in 1996 and amended by the Senate (96-S 3142 Sub A, as amended) as well as legislation considered by the House in 1999 (99-H 5795 Sub A/001), to determine whether the Subcommittee should recommend to the Task Force and the Director the introduction in the General Assembly of comprehensive wetlands reform legislation.

Comprehensive Wetlands Reform Legislation

Each of the members were aware that wetlands reform legislation initially developed by the Governor's Wetlands and ISDS Task Force originally introduced in 1996 failed passage in 1996 and in each subsequent General Assembly. In general terms, the members of the Working Group felt that comprehensive statutory change based on the deliberations of the Governor's Task Force was a good resolution to many of the issues discussed at that time. The Statutory Group agreed that the issues identified in 1996 by the Governor's Task Force still need to be addressed through legislative change.

The April 27, 2000 meeting of the Working Group was dedicated to a discussion of whether to recommend reintroduction of comprehensive wetlands reform legislation based on the 1996 Senate version referenced above. It was the consensus of the Working Group that in light of improvements in scientific knowledge concerning the importance of wetlands and buffering lands that additional work should be done to forge a new consensus on comprehensive wetlands reform legislation. In addition, it was the sense of the Subcommittee that it was not the appropriate vehicle to develop a consensus on such legislation.

In light of the obstacles to legislative action, effort should be made to address many of the issues identified by the Task Force through regulatory changes, if possible, in order to show a commitment by DEM to reform and a willingness to make regulatory changes consistent with wetlands reform which would protect the resource, improve the program's performance and bring the Wetlands Program into line with the current state of the science.

Task Force Issues

The following is a summary of the discussion concerning the specific issues identified by the Task Force for review by the Statutory Working Group:

1. **Increase the length of time for permit renewals/expiration.** The Task Force identified the duration of permits as an issue requiring some discussion by the Statutory Working Group. Some parties expressed concern that the current time limit for permits (one-year permit with three successive one-year renewals) is not sufficient for completion of certain major transportation or development projects. It was suggested by Sean Coffey that perhaps issuance of a draft permit for significant transportation and development projects could provide a period of time of up to two years for DOT or a major developer to complete other necessary local permitting or transportation related permitting before the aggregate four-year term of the permit would begin to run. This concept was discussed further at the March 15 and April 13, 2000 meetings, and the consensus of the Group was that it could create an even more cumbersome process for the Department. As an alternative, the Group discussed proposing statutory language to eliminate all time limits in the Wetlands Act and delegating to the Director authority to prescribe time limits for permits or renewals or alternatively giving the Director authority in accordance with regulations to authorize additional time for DOT transportation projects or projects of the Economic Development Corporation. On April 13, the Working Group recommended that DEM work directly with DOT to develop an administrative process to review major transportation projects according to the a timeframe and procedures consistent with DOT project planning and implementation needs.

2. **Consider clarifying and strengthening the Declaration of Intent of the statute to include a statement that the State policy should be "no net loss of wetlands".** The Working Group concluded that it was important to obtain a clear expression of legislative intent by the General Assembly which better reflects the value and importance of wetlands and the need for their protection in modern scientific terms. It was noted that there had been no substantial change to the Declaration of Intent since it was adopted in 1971. The Task Force members reviewed the revised Statement of Legislative Intent included in the 1996 Governor's Task Force legislation and the 1999 version and concluded that the statutory changes with respect to legislative intent would be appropriate for inclusion in legislation and submission to the General Assembly.

3. **Address the need for a variance provision in the existing statute.** Some members of the Working Group suggested that a variance procedure might be appropriate to assure that due process requirements are met within the wetlands program. Upon further discussion, it was the consensus of the Working Group that a variance procedure would be

required if the Wetlands Task Force considers adopting specific minimum standards (e.g. prohibitions, buffers setback minimums) to provide some opportunity for an applicant to demonstrate a need for relief. On the other hand, if the program continues with its current approach to evaluating the impact on wetlands on essentially an ad hoc basis, then the addition of a variance process may be avoided. It was the consensus of the Working Group that if a variance process is required, it could be created by regulation without the necessity of legislation.

4. **Evaluate the definition of jurisdictional area, including buffer zones.** The Task Force reviewed the 1999 version of the wetlands legislation which redefines the areas adjacent to the wetlands as “bordering lands” and in certain cases increases the size of bordering lands. It was noted in the discussions of the Working Group that the treatment of the “areas within 50, 100 or 200 feet” of a particular wetland type as part of the wetlands had created the impression that the wetlands program had exceeded its authority to protect wetlands by extending the reach of the program into the bordering areas. The Group acknowledged that the bordering areas were worthy of protection and regulation based on their significance in protecting or enhancing the value of the adjacent wetlands. It was generally recommended that while it is important to eventually return to the General Assembly with a proposed redefinition of the bordering lands that it would be useful in the interim for DEM to segregate the “areas within” some distance from the wetlands proper and develop regulations and performance standards to assess work proposed within those areas. It was also suggested that the administrative findings section of the regulations be expanded to discuss the significance of the bordering areas in current scientific terms and that regulations be developed to establish BMPs and standards for evaluating work which falls within the bordering areas adjacent to specific wetlands types. It was also suggested that protection of bordering lands may best be incorporated into an overall watershed planning approach.

5. **Include municipal control and oversight provisions in the Wetlands Program.** The Working Group declined to make any recommendation concerning the current statutory provisions concerning municipal oversight of wetlands projects or to make recommendations. It was suggested that an effort should be undertaken by the wetlands program to solicit and incorporate municipal involvement and comment on wetlands applications early in the review process.

6. **Evaluate the issue of third party access to property in order to delineate wetlands.** This issue involves the need to map portions of wetlands which may exist on property adjacent to a wetlands site which is not owned by the applicant. According to wetlands staff participating in the Working Group, procedures have been developed to avoid the need for extensive offsite mapping of wetlands on adjacent properties as part of the wetlands review process. Therefore, no further action was recommended.

Other Issues

The April 27, 2000 meeting of the Working Group also discussed several issues raised by the Director and other members of the Group.

1. **Accuracy of information provided with applications.** The Director pointed out that often, the application review process gets delayed because of inaccurate information submitted by engineers and wetlands professionals. It was recommended by several Working Group members that more specific criticism in deficiency notices should be incorporated into the wetlands review process and copies of any deficiency notices directed to the applicant and the applicant's attorney. In addition, it was suggested that the Department reach out to the Board of Professional Engineers and the Association of Wetlands Scientists to discuss educational programs and other methods of improving the completeness and accuracy of information provided. The Group also discussed the problem of strict compliance with wetlands permitting requirements. It was suggested that by rule, for specific types of projects, DEM could require professional oversight and certification of compliance with permit provisions as a condition of the issuance of a permit. It was also suggested that posting of a bond for completion of mitigation work be considered. However, such a requirement would require legislative authorization.

2. **CRMC/DEM jurisdiction.** It was brought to the Group's attention that the Providence Foundation had communicated with the Director of DEM and the Executive Director of the Coastal Resources Management Council proposing that overlapping jurisdiction be eliminated by essentially drawing a line at the Point Street Bridge and providing that north of the Bridge, the freshwater wetlands program at DEM would exert exclusive jurisdiction while the CRMC exercise jurisdiction south of that point. The CRMC Executive Director cited concerns that such a determination would be inconsistent with Rhode Island law and federal mandates. After further discussion, it was suggested that the CRMC and DEM develop a coordinated review process for work north of the Point Street Bridge and that DEM consider relying on the CRMC wetlands review in making its determinations concerning permits. CRMC would continue its broad review of coastal wetlands and other values required under state legislation and federal mandates. CRMC would retain federal 401 certification responsibility.

Conclusion

In conclusion, the members of the Working Group thanked Director Reitsma for the opportunity to discuss these significant issues directly with him and DEM staff. Members of the Working Group also offered their continued assistance in the future.

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